duction from these opinions—a new canon of constitutional law, viz.: that *a statute interfering with "natural rights" must be shown to be authorized, not that it must be shown to be prohibited.*

Philadelphia, November 30, 1892.

CAN PRICES BE REGULATED BY LAW?

AN EXAMINATION OF MR. ARTHUR T. HADLEY'S ARTICLE, "LEGAL THEORIES OF PRICE REGULATION."

BY WM. DRAPER LEWIS, PH.D.

MR. ARTHUR T. HADLEY, in the first number of the *Yale Review*, has an exceedingly able and very entertaining article on "Legal Theories of Price Regulation."[1] The article is historical in form. Commencing with the Roman law, he points out how nowhere has the doctrine that a man is absolute master of his own property, in respect to the price at which he will sell it, or the charge for its use, been carried out so consistently as at Rome. On this point he says: "Such a state of things was only possible where law was highly developed and commercial transactions but slightly so. In ancient Rome both of these conditions existed in a marked degree. The Romans were able to command the products of the world by the compulsory labor of slaves at home, and taxation of people who were little better than slaves abroad. The rich did not need to sell; the poor did not need to buy. Under these circumstances price was a matter of trifling importance compared with that fixity of tenure on which the Roman organization rested." Then the writer shows how in mediæval Europe farmers, being obliged to trade with artisans, an exchange was no longer an isolated transaction, but "part of the work of supplying a market in which all producers, to a greater or less degree, were interested." Consequently

[1] *Yale Review*, Vol. I, p. 56 (May, 1892).

there grew up a system of regulation of price by guilds; which, being abused, led the courts to resort to the common law system of the regulation of prices by enforced free competition. Thus we are told, that "The Roman law allowed free determination of prices as a consequence of the unrestricted right of private property. The common law encouraged it as a means of supplying a market more fully and fairly than could be done in any other way. The common law, both in its rule and exceptions, recognized the public commercial end, which the Roman law did not."

Besides enforcing free competition through the courts by rules against restraint of trade, in the positive acts of legislation, such as laws against trusts, etc., free competition has been and still is attempted to be enforced on the common law theory that the price of a commodity is a public matter.

Mr. HADLEY then points out how, in many instances, enforced competition evidently will not work. There are some industries in which at the present time competition is practically impossible. The next step in the development of price regulation was, therefore, the attempt to limit prices in such industries by "charter maxima." This again, it is pointed out, allowed great inequalities. Within the charter maxima, as in the case of a railroad, unequal rates could be charged different shippers.

In this dilemma our author tells us that the State governments in the United States took another step. The legislatures established rates or "prices" to be charged by railroads. The constitutionality of these acts came before the Supreme Court in the Granger Cases.[2] The railroads resisted on the ground of unlimited property rights. The Court upheld the constitutionality of the law. Mr. HADLEY'S comment on this decision is as follows: "It was one of those practical makeshifts which, like the jury system, prevent our laws from being too good for the people who live under them. As against the position of the corpora-

[2] 94 U. S., 113–187 (1876).

tions, however, the grounds of the decision *were a little stronger than they seemed.* The claim of the right of a railroad to make rates just *as any other business man* was not one which could have been sustained in precedent." The claim of the railroad was a claim that government had no right to interfere and regulate the price for the sale of property. Mr. HADLEY seems to consider that this claim is just, but, owing to the exceptional kind of property, *i. e.*, being devoted to public use, thinks it could be regulated by the State. This was certainly the way in which the majority of the Court handled the Granger Cases. But Mr. HADLEY himself has just taken pains to show us the fallacy underlying his own and the Court's narrow reasons for their opinion that a legislature of a State can regulate the rates of fare charged by a railroad company. The Supreme Court of the United States in the Granger Cases, in the case of Chicago, etc. R. R. Co. *v.* Minnesota,[1] and in the later case of Budd *v.* New York,[2] seems to start out with the assumption that the price of any commodity or service is not a public matter, and, therefore, that price cannot be regulated by the legislature of the State, except where the thing sold is a "public service." This point of view is one which entirely ignores the fact, which Mr. HADLEY himself has just pointed out, that the common law rules against combinations in restraint of trade are based on the assumption that the public as a whole has an interest in *price;* not only in the price of railway tickets, but in the price of everything sold in the markets of the nation. If the price of wheat cannot be regulated on the ground of property, why are not laws against corners in wheat void on the ground that they interfere with the sacred rights of private property? Against the main proposition of the railway companies in the Granger cases, the possible ground for the decision was indeed *stronger than it seemed.* It is the same as the broad ground of the common law when it strikes at com-

[1] 134 U. S., 276 (1889).

[2] 143 U. S., 517 (1891 Term). See article by Mr. McMurtrie, *supra*, p. 1.

binations to raise prices and brands them as illegal—the ground that price is a public matter, and regulations of price which the people desire the people can enforce. This ground, so plainly stated by Mr. HADLEY, so plainly recognized by the courts in upholding laws against trust combinations, would be clearly seen by both if it was not for the confused and confusing "police power" which, on the one hand, as in Mulger *v.* Kansas,[1] enables a State to annul the safeguards of the Constitution against the taking of private property; and on the other, as in the Granger cases, tends to limit all State activities to so-called "police laws."[2] Indeed, the words seem to have a magic in them, which mystifies the reasoning powers of the courts and bar, till rising from the study of reported constitutional cases, one sighs for the coming of another MARSHALL to sweep, by his clear-cut analysis, the mists of confusion away.

The circumstances of industry render enforced competition useless in the case of a railroad, or oblige people to use a railroad if they want to travel. These facts justify legislative determination of the prices of transportation. Why then, if in the judgment of legislatures enforced competition is always useless, should they not regulate all prices? If the inability of enforced competition to produce results is the ground of legislative interference in the one case, why should it not be sufficient in all cases? And if a legal magazine may give an economic forecast or give economic predictions we should say that the present development of industry would lead to the legal regulation of the price of many commodities, in which we are now trying the experiment—rapidly proving a failure—of anti-trust and combination laws.

MR. HADLEY, after this quasi approval of the Court's position in the Granger Cases, that railroads have not an

[1] 123 U. S., 623 (1887).

[2] I do not wish to be understood as approving those expressions of the majority in the Granger Cases, which tend to limit the safeguards against taking private property without compensation to an actual transference of title. See *infra*.

unlimited right to fix what rates they please "*just like any other business*," concludes by defending the Court's position in the now great case of Chicago, etc., R. R. Co. *v.* Minnesota[1]. The spirited dissent of the late Mr. Justice BRADLEY, he regards as "strange," and of that part of the report of the Interstate Commerce Commission for 1890 which says that the making of rates is an administrative and not a judicial function, and that the legislature has unlimited powers to fix what rates it pleases, we read "that it shows the looseness of reasoning to which the people have been accustomed in modern times." And yet we are compelled to observe that Mr. HADLEY has mistaken the position of the Court in the Minnesota Railroad Case, just as the dissenting judges and the Interstate Commerce Commission mistook it.[2] This mistake on the part of Mr. HADLEY may be due to the fact that individual judges, composing a minority of the majority, may have intimated to him that the legislature had not the power to fix what rates they pleased. From a remark of the late Mr. Justice BRADLEY, which came to the notice of the writer, it would seem to be beyond dispute that the dissenting opinion in the case was written against the expression of opinion in the consultation room by individual members of the majority, rather than against the written opinion of the Court, and that the learned Justice's mind was turned, by his astonishment at what he understood as the position of the majority, away from a consideration of the real merits of the case.

As was pointed out in a review of the life of the late Justice, which appeared, shortly after his death, in THE AMERICAN LAW REGISTER AND REVIEW,[3] a power to do what another considers reasonable is no power at all. If the power of the legislatures of the States or the State Railroad Commissioners to fix rates, is a power limited to what Judges consider reasonable, we may have, as Mr. HADLEY says: "A most important counterpoise to the

[1] 134 U. S., 418 (1889).

[2] Of MR. HADLEY'S paper it may be fairer to say that he has failed to point out any ground for the decision of the Court.

[3] AMER. LAW REG. AND REV., p. 278, April, 1892.

evils of unrestricted democracy," but we accomplish this result by abandoning democracy and substituting a judicial oligarchy.

But let us turn from what Mr. HADLEY thinks the Court decided to what they actually did decide. The Act of Minnesota, passed March 7, 1887, established a Railroad and Warehouse Commission.[1] The commissioners were given the power, if they considered the rates fixed by the railroads unreasonable, to compel any carrier to change the same, and to adopt such charge as the commission "shall declare to be equal and reasonable." The Courts of the State were directed to issue writs of mandamus to enforce the orders of the commission. The commission fixed certain rates for freight to be charged by the Chicago, etc., Railroad Company, and the company refusing to put such rates into operation, the commission applied to the courts for a writ of mandamus. The Court granted the writ, and refused the application on the part of the railroad company to prove that the rates fixed deprived them of their property, in contravention of the Fourteenth Amendment. On appeal, the opinion of Mr. Justice BLATCHFORD points out that the State has a right to fix the rates of fare. Then the learned Justice, in discussing the question raised by the railroad's being deprived of the right to question the rates fixed by the commission before the Court, says: "The question of the reasonableness of a rate charged for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question of judicial investigation, requiring due process of law for its determination."[2] Had the learned Justice stopped there, there would be much to be said in favor of Mr. HADLEY'S interpretation of the meaning of the decision, *i.e.*, that it means that reasonableness was a question for the Court, and we must infer that the Court should go into, in determining the "reasonableness," all the economic and social questions involved. Indeed, it would only be the absurdity of the posi-

[1] Gen. Laws, 1887, c. 10.

[2] Op., p. 458.

tion apparently assumed that would lead us to doubt this interpretation of the meaning of the decision. But the opinion does not stop there. Mr. Justice BLATCHFORD goes on to say: "If the company is deprived of the power of charging reasonable rates for the use of its property, and such an investigation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, *in substance and effect, of the property itself.*" We begin to see what the word reasonable, as used by the Court, means. It does not mean economically reasonable or politically expedient, it does not point to some undefined standard of justice residing in the judicial conscience, but to the question: Has the legislature, in establishing the rate, taken private property? The opinion that this is the position assumed by the majority is strengthened by the short opinion of the late Mr. Justice MILLER, where he says: "Neither the legislature, nor the commission acting under the authority of the legislature, can establish arbitrarily and without regard to justice and right a tariff of rates for such transportation, which is so unreasonable as to practically *destroy the value of property* of persons engaged in the carrying business." [1]

We may be mistaken in our interpretation of the opinion

[1] Op., p. 459. Then he adds that neither has the legislature power to fix such exorbitant rates as to interfere with the public right of the use of such transportation.

This last proposition, while intensely interesting, need not be discussed here. We can point out, however, that the direct conclusion from the position assumed is that, if a legislature cannot fix a rate unreasonably high, neither can an individual owner of a railroad, and, therefore, without any statute on the subject a shipper can obtain relief from unreasonably high charges in the courts. Did not the late learned Justice forget that the interests of the people as a whole are represented by the legislature of the State? That the courts must presume that the rates fixed by the legislature are the most expedient rates from the standpoint of the people taken as a whole? The only business of the courts is to see that private property has not been taken for public purposes without just compensation. A man's right to ride on a railroad of the State is not one of his private rights which the legislature cannot take away without paying him. True, the legislature must not make different rates for different men, *i.e.*, deny them the equal protection of the law. But is it not paradoxical to say that a legislature cannot take public property for public use without compensating the public?

of the Court, but we cannot believe that the Court mean, and will so decide when the question comes properly before them, that the power of the legislature to fix prices at least for what is called "public business" is not practically unlimited; but we think they must mean that where private property is taken compensation must be made. If Mr. HADLEY'S interpretation is correct, the decision richly merited the language of the dissent of the great constitutional lawyer. But if the interpretation given is the proper one, all lovers of individual liberty, of law and justice can properly rejoice. It is a most momentous decision. It means that the old and vicious doctrine of Mulger *v.* Kansas,[1] of Fertilizing Co. *v.* Hyde Park,[2] has been abandoned, and that the dissent of Mr. Justice FIELD in the former case, in so far as he considers that property may be taken if one is deprived of the use, even though the title may remain in him, represents the present opinion of the Court. Those cases decided that a "taking" of private property must be a physical taking in order to render the State liable for compensation: that a man who has put up a beer factory under permission of the legislature of the State, without being deprived of his property, can be deprived of the right to manufacture beer, though his machinery be useless for anything else—an unfairness too palpable to stand the test of time.

The confusion which arises in discussing these cases, as in discussing the case of Chicago, etc., R. R. *v.* Minnesota, springs from the apparent inability of many people to separate the two questions involved in each. The first is: Has the legislature power to fix prices or prohibit certain uses being made of property? The second, and entirely distinct question, is whether the prices fixed, or the prohibition result in taking private property within the meaning of the Fourteenth Amendment requiring just compensation to be made. Now, the position of the Supreme Court and the other Courts of America on the first question heretofore

[1] 123 U. S., 623 (1887).

[2] 97 U. S., 659 (1887); see also Beer Co. *v.* Mass., 97 U. S., 25 (1878).

has been that the legislature has no power to fix the prices of commodities, or to say to the citizens you must not manufacture this or that, no matter how expedient they might consider such a course to be, unless the public have a *peculiar* interest in the business, or the morals or health of the community is at stake. This position we believe to be open to criticism on the ground that the common law is right when it declares that the price of any commodity taken as a whole, or the success of any single industry taken as a whole, is a public matter, and therefore combinations in restraint of trade, etc., are, if harmful, unlawful.

On the other hand, up to the opinion in the case of Chicago, etc., Railway Co. *v.* Minnesota, the Supreme Court and other American courts had held that where prices could be regulated at all, or where a business could be prohibited at all, such prohibitory laws or regulation of prices could never be construed into taking of property, however useless they might render the specific kinds of property affected. Such an interpretation, which rendered constitutional provisions regarding compensation for private property words with a very limited practical meaning, we are glad to believe will, in the immediate future, be definitely abandoned. That is what we read from the decision of the Court commented on by Mr. HADLEY. At the same time we believe that Mr. HADLEY, or any one else, cannot seriously maintain that courts should pass on the expediency of a law regulating prices in the light of abstract justice and sound economic policy. Certainly such an opinion cannot be the sober judgment of the great lawyers who formed the majority of the Court on that occasion.[1]

[1] There is an interesting question growing out of the above. Public moneys must be expended for a public purpose. This may be conceded. Suppose the legislature of a State should compel all who choose to sell wheat to sell it at one-half the cost and compensate them for their loss, would this be spending money for a public purpose? See a partial answer to this question in an article by the writer in 31 AMERICAN LAW REGISTER AND REVIEW, p. 301 (May, 1892), entitled, "Is the Bounty on Sugar Constitutional?" in reply to an article on the same subject by CHARLES F. CHAMBERLAYNE, ESQ., on the "Sugar Bounties," in *Harvard Law Review*, Vol. V, p. 320.